926

CASE NO. S-10-280

IN THE SUPREME COURT OF NEBRASKA

STOREVISIONS, INC.,
Plaintiff/Appellee,

v.

OMAHA TRIBE OF NEBRASKA A/K/A OMAHA NATION,
Defendant/Appellant,

APPEAL FROM THE
DISTRICT COURT OF THURSTON COUNTY, NEBRASKA
Honorable Darvid D. Quist

APPELLEE STOREVISIONS, INC.'S RESPONSE TO APPELLANT'S MOTION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

PROPOSITIONS OF LAW

I.

Because Nebraska's rules are modeled after the Federal Rules of Civil Procedure, Nebraska Courts look to the federal court decisions for guidance. *Bohaboj v. Rausch,* 272 Neb. 394, 397, 721 N.W.2d 655, 659 (2006).

II.

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may challenge either the factual truthfulness or the facial sufficiency of the plaintiff's jurisdictional allegations. *Osborn v. United States,* 918 F.2d 724, 729 n. 6 (8th Cir.1990).

III.

Trial courts have wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts on a motion to dismiss for lack of jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(1), *Johnson v. U.S.*, 534 F.3d 958 (8th Cir. 2008).

IV.

To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction, and may do so by affidavits, exhibits, or other evidence. Fed.Rules Civ.Proc.Rule 12(b)(1); *Romak USA, Inc. v. Rich,* 384 F.3d 979 (8th Cir. 2004).

V.

In a factual challenge to jurisdiction, "the trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case-there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of

its power to hear the case. *Brown v. Grand Island Mall Holdings, Ltd.,* (Not Reported in F.Supp.2d), 2010 WL 489531 at *2 (D.Neb. 2010).

VI.

A court's election to consider affidavits or other documents submitted in support of a factual Rule 12(b)(1) motion does not convert the Rule 12(b)(1) motion into a motion for summary judgment. *Osborn v. United States,* 918 F.2d 724, 729 n. 6 (8th Cir.1990)).

VII.

Agency principals are applicable in determining sovereign immunity issues. *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe,* 107 P.3d 402 ,407 (Colo. 2004); *Richmond v. Sheahan,* 270 F.3d 430 (7th Cir. 2001).

VIII.

An agency "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *City and County of Denver v. Fey Concert Co.,* 960 P.2d 657, 660 (Colo. 1998); *Restatement (Second) of Agency*, §1(1) (1958).

IX.

"An agent can make the principal responsible for his or her actions if the agent is acting pursuant to apparent authority, regardless of whether the principal has knowledge of the agent's conduct." *In Re Marriage of Robbins,* 8 P.3d 625 (Colo. App. 2000). *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe,* 107 P.3d 402 , 407 (Colo. 2004); *Restatement (Second) of Agency* §§26-27.

X.

"For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her." *Korcic v. Beverly Enters. – Neb.,* 278 Neb. 713, 720, 773 N.W.2d 145, 151 (2009).

XI.

"Apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct". *Korcic v. Beverly Enters. – Neb.,* 278 Neb. 713, 773 N.W.2d 145, 151 (2009).

ARGUMENT

I. THIS COURT'S OPINION AFFIRMING THE DECISION OF THE DISTRICT COURT WAS PROPER.

A. This Court properly found that Appellant's argument that the district court erred in receiving the StoreVisions affidavits into evidence was without merit.

Appellant states in its Brief in Support of Motion for Rehearing that it was "prejudicial error" for the trial court to admit the affidavits of StoreVisions' principals into evidence because they were not served prior to the day of the hearing on the Tribe's Motion to Dismiss. Brief at p. 1-2. The basis for the Tribe's assertion rests with Neb. Rev. Stat. §25-1332, governing summary judgment motions, which states that, on a motion for summary judgment, opposing affidavits may be served prior to the day of the hearing. *See* Neb. Rev. Stat. §25-1332; Brief at p. 3-4. Because affidavits were used at the motion to dismiss hearing, the Tribe asserts that the trial court should have or did convert the dismissal motion to one for summary judgment, thereby making the notice

requirement of §25-1332 come into play. Brief in Support of Motion for Rehearing, p. 1-4.

In its opening Brief, Appellant relied upon the language of Neb. Ct. R. Pldg. §6-1112(b) and the case of *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 754 N.W.2d 607 (2008) in support of its argument that the motion to dismiss should have been converted to one for summary judgment. Tribe's Opening Brief at p. 27-28. In its Opinion in this matter, however, this Court correctly pointed out the inapplicability of both Neb. Ct. R. Pldg. §6-1112(b) and *Crane* to this matter. In the Court's Opinion at 248-249, the Court accurately noted:

> The basis of the Tribe's assignment of error is § 6-1112(b), which provides in relevant part:
>
> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in §§ 25-1330 to 25-1336, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.
>
> The Tribe's motion to dismiss is not based in § 6-1112(b)(6), but instead on § 6-1112(b)(1) for lack of jurisdiction over the subject matter. Thus, this language in § 6-1112(b) and this court's opinion in *Crane Sales & Serv. Co.* are inapplicable.

As the Court properly observed, the Tribe's Motion attacked the trial court's jurisdiction to hear the matter pursuant to §6-1112(b)(1), as opposed to the legal sufficiency of the Complaint as one would on a motion to dismiss for failure of the pleading to state a claim upon which relief could be granted pursuant to §6-1112(b)(6). Outside of alleging that the trial court lacked "jurisdiction of the subject matter of the action" and that the trial court lacked "jurisdiction over the Defendant", there were no other allegations upon which the Motion was based. (T42). As such, Appellant's Motion tested the substantive merits of the claim pursuant to §6-1112(b)(1). Conversely, a motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, such that a court may typically look only at the face of the complaint to decide a Motion to Dismiss brought pursuant to Neb. Ct. R. Pldg. §6-1112(b)(6). *See, e.g., Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009).

Based on the plain language of the statute, it is clear that the trial court was not required to convert the Tribe's Motion to Dismiss to a Motion for Summary Judgment, and Neb. Rev. Stat. §25-1332, governing summary judgment proceedings, is therefore not relevant to the analysis here. Likewise, the Tribe's reliance on *Woodhouse Ford, Inc. v. Laflan*, 268 Neb. 772, 687 N.W.2d 672 (2004) at p. 4 of its Brief has no applicability here, as the case dealt with the timeliness of the submission of an opposing affidavit on summary judgment motion, not a motion to dismiss or conversion of a motion to dismiss. Nothing required the district court to treat the dismissal motion as one for summary judgment, again, because before the trial court was a motion brought pursuant to Neb. Ct. R. Pldg. §6-1112(b)(1), rather than §6-1112(b)(6).

The record in this case demonstrates that the trial court did not indicate that its receipt of the StoreVisions affidavits converted the motion to one for summary judgment, and, for the above-stated reasons, the trial court was not obligated to do so. Further, there is nothing in the record to suggest that the Tribe asked the trial court to convert the motion to one for summary judgment or even raised the issue of conversion. Appellant's counsel objected to the offer of the StoreVisions affidavits on the basis that they were not served prior to the hearing, but presented no authority to the court whatsoever for his objection, stating, "[I] don't know that the Statutes address when they're supposed to be shared on a Motion to Dismiss . . .." (7:25-8:1-3). The following, however, is instructive to this analysis.

Because Nebraska's rules are modeled after the Federal Rules of Civil Procedure, Nebraska Courts look to the federal court decisions for guidance. *See, e.g., Bohaboj v. Rausch,* 272 Neb. 394, 397, 721 N.W.2d 655, 659 (2006). Trial courts have wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts on a motion to dismiss for lack of jurisdiction. *See* Fed. R. Civ. P. 12(b)(1); *Johnson v. United States.*, 534 F.3d 958 (8th Cir. 2008). To defeat a motion to dismiss for lack of jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction, and may do so by affidavits, exhibits, or other evidence. Fed. R. Civ. P. 12(b)(1); *Romak USA, Inc. v. Rich,* 384 F.3d 979 (8th Cir. 2004).

In *Osborn v. U.S.,* 918 F.2d 729 (8th Cir. 1990), the Court explained the "unique nature" of a factual challenge to jurisdiction under 12(b)(1):

> A court deciding a motion under Rule 12(b)(1) must distinguish between a "facial attack" and a "factual attack." In the first instance, the court restricts itself to the face of the pleadings ... and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6). The general rule is that a complaint shall not be dismissed " 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." ' In a factual attack, the court considers matters outside the pleadings ... and the non-moving party does not have the benefit of 12(b)(6) safeguards.

Osborn v. U.S., 918 F.2d at 724, 729 n. 6 (citations omitted) *quoting Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir.1977)

> On a factual challenge to jurisdiction, the federal courts have further explained:
>
> The trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case-there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.
>
> As no statute or rule prescribes a format for evidentiary hearings on jurisdiction, 'any rational mode of inquiry will do.' *Osborn,* 918 F.2d at 730 (quoting *Crawford v. United States,* 796 F.2d 924, 929 (7th Cir.1986)). So

long as the court has afforded the parties notice and a fair opportunity to be heard, an evidentiary hearing is unnecessary. *See Johnson v. United States,* 534 F.3d 958, 964-65 (8th Cir.2008) (district court did not abuse its discretion in deciding Rule 12(b)(1) motion on affidavits and briefs where neither party requested a hearing).

Brown v. Grand Island Mall Holdings, Ltd., (Not Reported in F.Supp.2d), 2010 WL 489531 at *2 (D.Neb. 2010).

Most important, a court's election to consider affidavits or other documents submitted in support of a factual Rule 12(b)(1) motion ***does not convert the Rule 12(b)(1) motion into a motion for summary judgment.*** *See Osborn, supra,* 918 F.2d at 729; (emphasis supplied); *McCoy v. Department of Veterans Affairs Nebraska Western Iowa Health Care System,* (Not Reported in F.Supp.2d), 2006 WL 861303 at *1-*2, (D.Neb. 2006).

Based on the foregoing, this Court correctly held that the Tribe's assertion that the district court erred in admitting the StoreVisions affidavits into evidence was without merit.

Furthermore, whether the court erred in its procedure regarding the motion to dismiss (which StoreVisions asserts it did not) is not decisive of the matter. The district court gave the parties time to submit briefs post-hearing on the Motion to Dismiss, which both parties did. Counsel for the Tribe had a brief in support of the motion to dismiss with him at the hearing, but asked for time to "respond" and "expand on it" and was granted an additional seven days post-hearing to submit a brief. (7:9-12; 13:10-11; 15:16-25; T44). Counsel for StoreVisions, who had not received a copy of the Tribe's

brief in support of their motion to dismiss at the time of the hearing, asked for and was granted leave to submit a responding brief. (15:16-25; T44). Counsel for the Tribe could have asked to continue the hearing if the affidavits were so objectionable, but he did not. He could have requested an evidentiary hearing or sought to submit supplemental affidavits, but did not. He could have asked the trial court to convert the motion to one for summary judgment or seek clarification from the court on the conversion issue, but he did not. The Tribe's claims on p. 4 of its Brief that it did not have the opportunity to rebut the representations made in the StoreVisions affidavits are therefore not well-taken.

Moreover, it should not be overlooked that at no time have the facts testified to in the StoreVisions affidavits ever been disputed by the Tribe. Indeed, the facts of this case have never been in dispute. The Affidavit of Sterling Walker, offered by the Tribe in support of its Motion to Dismiss, in no way disputed that the waiver was, in fact, signed. The Tribe also does not contend that it could dispute the evidence in any event, and, despite being given the reasonable opportunity to submit additional material, failed to do so. This is so because the facts of this case are not, and have never been, in dispute. As such, whether the Motion to Dismiss was properly or improperly converted to a summary judgment motion is irrelevant; there was no prejudice to the Tribe either way and any error claimed by the Tribe (which StoreVisions disputes) was therefore harmless in any event.

The affidavits offered and admitted in opposition to the motion to dismiss, in large part, also only merely reiterated the contents of the Complaint. (E2,1-3:7-8,v.II; E3,1-3:7-8,v.II). In addition, the Waiver that was attached to the StoreVisions affidavits is the

same Waiver that was attached to the Complaint. (E2,3-5:7-8, v.II; Ex. A of E2; E3,3-5:7-8, v.II; Ex. A of E3; T1,13). The Tribe had notice of the contents of the Complaint and the Waiver when the Complaint, which was filed in October of 2009, was served—months before the hearing on the motion to dismiss in January of 2010. (T1). It can hardly be claimed that there was any unfair surprise in this regard.

The only additional circumstances presented in the opposing affidavits concerned the circumstances under which the Waiver was executed. It should not be forgotten that the record in this case unequivocally establishes that a quorum of Appellant's Tribal Council was present at the time the Waiver was executed; the Tribe was thus well aware of the circumstances under which the Waiver was executed and failed to dispute the same. Indeed, it cannot. In any event, the circumstances under which the Waiver was signed can hardly come as a surprise to the Tribe considering their presence and participation at the meeting where it was executed.

Because the Tribe attacked the court's jurisdiction under §6-1112(b)(1), the district court was not obligated to convert the Tribe's Motion to Dismiss to one for summary judgment. The case law also makes clear that it was well within the district court's province to receive the StoreVisions affidavits into evidence. In addition, there was no unfair surprise for the reasons stated above. This, coupled with the fact that counsel for the Tribe was given ample time to respond to the arguments made at the hearing, and in fact did so, any error (which Appellee disputes) was harmless in nature and was cured by the response time given, which the Tribe failed to take advantage of. The Tribes' argument that the StoreVisions affidavits were received in error without

merit and this Court properly affirmed the district court's receipt of such affidavits into evidence. Rehearing of this matter is therefore not warranted.

B. The Court's application of general laws of agency in this case and conclusion that the Appellant's Chairman and Vice Chairman had apparent authority to waive Appellant's sovereign immunity was proper.

In seeking rehearing of this matter, Appellant argues that this "Court failed to consider that agency law does not apply apparent authority to a sovereign or governmental entity." (Appellant's Brief in support of its Motion for Rehearing at p. 5). Appellant also claims that "existing Nebraska law also contradicts the Court's opinion" and that the opinion "is at odds with Nebraska law stating that a failure to give authority is equal to an express provision prohibiting authority." *Id.* at p. 5-6.

Appellant, however, fails to cite one case in support of this contention or bring one Nebraska case to this Court's attention that stands for that proposition that agency principles are inapplicable in deciding whether a federally recognized Native American tribe has waived its sovereign immunity. Instead, Appellant misplaces reliance on inapplicable case law. The case of *Lincoln & Dawson County Irr. Dist. v. McNeal*, 60 Neb. 613, 83 N.W. 847, 849 (1900), relied upon by Appellant at p. 5-6 of its Brief, for instance, is inapposite and has no applicability here whatsoever. *Lincoln* had nothing to do with the issues before this Court: whether agency principles can be applied in finding that an agent of a tribe had apparent authority to waive a tribe's sovereign immunity. Instead, *Lincoln* held that irrigation districts organized under Nebraska law are public, rather than municipal corporations, and that their officers are public agents of the state whose powers are strictly limited by the statute under which the district is organized and

created. It is obvious that the facts of the instant case do not involve public or municipal corporations, agents of the state, or any powers given to agents by statute. *Lincoln,* therefore, is wholly irrelevant.

Likewise, *Schroll v. Beatrice*, 169 Neb. 162, 98 N.W.2d 790 (1959) and *State ex rel. Johnson v. Consumers Public Power Dist.*, 143 Neb. 753, 10 N.W.2d 784 (1943), also relied upon by Appellant at p. 6 of its Brief, have no application here. *Schroll* involved an whether an amendment evinced legislative intent to declare that a district organized under statute was subject to limitations of its charter, and held that the powers of a public power district to supply electricity was limited to rural inhabitants. *Johnson* involved an original proceeding in the nature of quo warranto to determine powers exercised by the Consumers Public Power District in possession, ownership and control of an electric system. It was stated in that case that domestic corporations may be expressly or impliedly prohibited by charter or by statutory provisions from doing business, making contracts, or doing other acts beyond limits of state or its right to act beyond such limits may be regulated. *Johnson, supra*, at 753, 10 N.W.2d at 784.

The scope of *corporate powers* not expressly or impliedly granted to a *corporation* by *charter* were found to be impliedly prohibited by both *Johnson* and *Schroll.* Unlike the present case, both *Schroll* and *Johnson* involved corporations and powers specifically enumerated or prohibited to such corporations by charter. Corporations, as opposed to tribal sovereign nations, are clearly not immune to suit unless provided for by an act of Congress or immunity is waived, and are governed by a separate and distinct body of law. In addition, neither case involved agency principles or discussed apparent authority or validity of waivers; rather, powers enumerated to

corporations by charter were at issue, thus making both of these cases immaterial. Because the cases relied upon by Appellant are irrelevant, contrary to Appellant's erroneous assertion, the holdings therein are not at odds with the holding issued by this Court in applying agency principles and affirming the district court's denial of Appellant's Motion to Dismiss.

Appellant's reliance in its Brief at p. 6-7 on the case of *U.S. v. Ellis*, 527 F.3d 203 (1st Cir. 2008), is also misplaced. That case dealt with a private party seeking performance of a promise allegedly made by the government, where the burden is on such party to show that a government representative had actual authority to bind the United States. *Id.* at 207 *citing Trauma Serv. Group v. United States,* 104 F.3d 1321, 1325 (Fed.Cir.1997). This is so, the Court explained, because the United States government can be bound only by those with authorization to do so. The U.S. Supreme Court has also explained:

> [A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

U.S. v. Ellis, supra, at 208 *quoting Fed. Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384, 68 S.Ct. 1, 92 L.Ed. 10 (1947).

Even a cursory read of *Ellis* makes it apparent that specific and distinct rules and laws are applicable when determining whether one has authority to bind the *United States government*, and such rules and laws are specific to the government agent alone and do not extend to all other sovereigns. Just because the doctrine of apparent authority cannot be applied to bind a *federal sovereign*, such as the United States, does not mean that the doctrine has no applicability under other circumstances, such as in this case. Indeed, Appellant fails to cite any case or authority that holds the doctrine of apparent authority cannot be applied in determining whether a tribe's sovereign immunity has been waived. To the contrary, *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe,* 107 P.3d 402 (Colo. 2004), specifically and unequivocally held that agency principles are applicable in determining whether tribal sovereign immunity has been waived. *See also*, *Richmond v. Sheahan,* 270 F.3d 430 (7th Cir. 2001) (holding that agency principals are applicable in determining sovereign immunity issues).

Ellis, and the other cases and authorities cited at pp. 7-10 of Appellant's Brief in Support of Motion for Rehearing deal with specific powers defined by Congress or delegated by legislation as applied to government employees and sovereigns created to achieve governmental ends, or states and municipalities, which are to be distinguished from a federally recognized Native American tribe. Moreover, not one of these cases address waiver of a federal sovereign's immunity from suit. These cases are therefore neither here nor there and have no applicability to this analysis at all.

This Court's affirmance of the district court's application of general laws of agency to the facts of this case and finding that the Appellant's sovereign immunity had been waived was proper, and Appellant has advanced no applicable authority to the

contrary. As was extensively discussed by Appellee in its Brief originally submitted in this appeal, *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe,* 107 P.3d 402 (Colo. 2004), is directly on point and was correctly relied upon by this Court in reaching its conclusion that the Tribe's Chairman and Vice chairman had apparent authority to waive the Tribe's sovereign immunity.

To briefly recap, the Court in *Rush Creek* held that the Ute Tribe's sovereign immunity had been waived by the apparent authority of the Tribe's CFO, who had signed a contract with Rush Creek on behalf of the Tribe that contained a waiver of immunity provision. In *Rush Creek,* the Court found that it was undisputed that the CFO was authorized to enter into contracts on behalf of the tribe, even though the tribe's constitution was silent concerning procedures for signing contracts. *Id.* at 407. The Court further found it was undisputed that the tribe's constitution was silent with regard to procedures for waiving sovereign immunity or authorizing persons to sign waivers. *Id.* Additionally, the Court found that where a person has authority to sign an agreement on behalf of a sovereign, it is assumed the authority extends to a waiver of immunity contained in the agreement. *Id.* at 408 *citing Restatement (Third) of the Law of Foreign Relations of the United States,* §456 Cmt. b (1997). Nothing in the record, the Court found, negated that assumption; to the contrary, the Court held that the silence of the tribe's constitution and personnel policy concerning sovereign immunity and waivers reinforced it. *Id.* at 408.

Because nothing in the tribe's constitution expressly addressed authority to waive sovereign immunity and nothing expressly refuted or prohibited it, the Court found that general laws of agency governed the case. *Id.* at 407 *citing Richmond v. Sheahan,* 270

F.3d 430 (7th Cir. 2001) (finding agency principals are applicable in determining sovereign immunity issues); *Finnie v. Jefferson County Sch. Dist. R-1,* 79 P.3d 1253 (Colo. 2003). The Court went on to state that "an agency 'results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.' " *Rush Creek* at 407 *quoting City and County of Denver v. Fey Concert Co.,* 960 P.2d 657, 660 (Colo. 1998); *Restatement (Second) of Agency*, §1(1) (1958).

The Court further found that such authority is established by evidence of "written or spoken words by other conduct of the principal which, reasonably interpreted, causes a person to believe that the principal consents to have the act done on his behalf by a person purporting to act for him." *Id.* at 407 *quoting Lucero v. Goldberger,* 804 P.2d 206, 209 (Colo. App. 1990) (emphasis omitted). The Court continued: "Apparent authority is created to protect third parties who, in good faith, rely upon their belief that an agency relationship exists between the apparent principal and agent. *Id.* at 407 *quoting Sigel-Campion Livestock Comm'n Co. v. Ravohain,* 71 Colo. 410, 207 P.82 (1922); *In Re Marriage of Robbins,* 8 P.3d 625 (Colo. App. 2000).

As this Court correctly pointed out in its Opinion, Nebraska case law also makes clear that "Apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct." *Korcic v. Beverly Enters. - Neb.,* 278 Neb. 713, 773 N.W.2d 145, 151 (2009). The Court in *Korcic* went on to state that "For apparent authority to exist, the principal must act in a way that induces a reasonable

third person to believe that another person has authority to act for him or her." *Id.* at 720.

Just as in *Rush Creek*, this Court appropriately found that the words, actions, and conduct of the Tribe, reasonably interpreted, would and did cause StoreVisions to believe that the Tribe consented to have the Waiver signed on the Tribe's behalf by its two highest members: the Chairman and Vice Chairman. Both of these individuals held themselves out as the Tribe's ultimate authorities and acted with apparent, if not actual, authority in assenting to the waiver of sovereign immunity.

Moreover, just as in the *Rush Creek* case, the Constitution and Bylaws of the Omaha Tribe of Nebraska are completely silent with regard to waivers of sovereign immunity and who had authority to sign such a waiver on behalf of the Tribe. (E1,1:4, vII, Ex. A to E1). Because nothing in Tribe's constitution expressly addresses authority to waive sovereign immunity and nothing expressly refutes or prohibits it, *see id.*, it was, as this Court held, reasonable for StoreVisions to rely upon the words and actions of the Tribe with respect to the waiver of immunity.

Here, the words, conduct, and deeds of the Omaha Tribal Council Chairman and Vice Chairman, as well as the words, conduct, and deeds of three of their five council members, who reviewed the Waiver and were present when it was signed, establishes that the Tribe's Chairman and Vice Chairman had authority to sign the Waiver at issue in this case. StoreVisions, in good faith, relied upon their belief that the Chairman and Vice Chairman had authority to sign the waiver, as such authority was represented to them at all times by not only the Tribe's two highest members, but also by three of the five other council members. (E2,3-5:7-8, v.II; E3,3-5:7-8, v.II).

It cannot be understated in this case that five out of seven of the Tribal Council Members, including the two top ranking members, were present when the Waiver was signed by the Tribe's top two ranking members. (E2,3-5:7-8, v.II; E2; E3,3-5:7-8, v.II). All members present reviewed the Waiver and watched on while the both the Chairman and Vice Chairman signed. *Id.* Moreover, StoreVisions' principals traveled to the Tribe's tribal headquarters and met in the tribal council meeting room where a quorum of the council was present. *Id.* The sole purpose of the meeting was for the Waiver to be reviewed by the Omaha Tribal Council and executed. *Id.* Such behavior on the part of the Tribal Council would most certainly induce a reasonable person to believe that the Council had authority to act., and this Court properly found that StoreVisions' reliance upon the words, actions, and deeds of the Tribe with respect to the waiver of immunity was reasonable.

Based on the foregoing, this Court appropriately held that, based upon the undisputed facts of this case, the Tribe's Chairman and Vice Chairman had apparent authority to waive the Tribe's sovereign immunity.

Finally, Appellant, in its Brief in Support of its Motion for Rehearing at p. 13-15, mischaracterizes this Court's reference in its opinion to resolution No. 08-74, wherein the tribal council acknowledged that it had previously entered into contracts with StoreVisions. Opinion at 247. This Court properly noted that, in addition to executing the waiver at issue in this case, the Tribe's Chairman and/or Vice Chairman executed the contracts entered into by the parties, and later acknowledged such in the above-referenced resolution. *Id.* Taken together, along with the additional fact that the Tribe's constitution and bylaws are silent with regard to procedure for waiving sovereign

immunity, this Court aptly concluded that StoreVisions' reliance on the words and actions of the Tribe with respect to waiver of its immunity was reasonable. *Id.*

The Tribe, however, misconstrues this Court's Opinion, arguing that the Court's reference to the resolution "somehow suggests that apparent authority can be determined after the fact or retrospectively." Brief of Appellant in Support of Motion for Rehearing at p. 14.

Again, it is clear from the Opinion that this Court was looking at several factors in determining whether the Tribe waived its sovereign immunity—the resolution acknowledging that the contracts were executed by the Chairman and/or Vice Chairman was but one factor, but it is clear from the Opinion that it was not the *only* factor that went into its analysis in correctly concluding that the Tribe's immunity had been waived. The Court clearly does not conclude or imply that this resolution referenced a waiver of sovereign immunity or ratified it, as the Tribe alludes to at p. 14 of its Brief. Instead, this Court merely correctly notes that the resolution served as acknowledgement that the Tribe entered into the contracts with StoreVisions that StoreVisions alleges were breached.

It is undisputed that the Waiver was signed in January of 2008 in the presence of five of the seven tribal council members at the Tribe's headquarters in the Tribe's tribal meeting room. It is also undisputed that the Tribe and StoreVisions entered into eleven separate contracts thereafter, beginning in April of 2008. (T1-41; E2,1-3:7-8, v.II; E3,1-3:7-8, v.II). It is undisputed that the Waiver was a separate document executed by the Tribe's two top-ranking officials. It is undisputed that the Waiver stated that the Tribe unequivocally waives its tribal sovereign immunity with regard to all future contracts

between the Tribe and StoreVisions, (T1, 13-14; E2,3:7-8, v.II; Ex. A of E2; E3,3:7-8, v.II; Ex. A of E3), which would necessarily include those acknowledged in resolution No. 08-74. It is also undisputed that the Tribe's constitution and bylaws are silent with regard to procedures for waiving sovereign immunity. Resolution No. 08-74 is also undisputed insofar as it serves as an acknowledgment by the tribal council that it previously entered into various contracts with StoreVisions.

The totality of these undisputed facts demonstrate that this Court properly concluded that the Tribe's Chairman and Vice Chairman were vested, at the very least, with apparent authority to waive the Tribe's sovereign immunity. Argument by Appellant that this Court's reference to the acknowledgement in the resolution somehow serves as a ratification of apparent authority after the fact defies reason. This Court's Opinion affirming the district court's denial of the Tribe's Motion to Dismiss was undoubtedly correct, and Appellant's Motion for Rehearing is without merit in every respect and should thus be denied.

CONCLUSION

For all the reasons stated herein, the district court's order denying Appellant's motion to dismiss was properly affirmed by this Court. It is clear that the district court did not err in admitting the StoreVisions affidavits into evidence at the hearing on Appellant's motion to dismiss pursuant to §6-1112(b)(1). Further, principles of agency law were properly applied in finding that Appellant's Chair and Vice Chair had apparent authority to execute the Waiver of Appellant's sovereign immunity. Appellant's Motion for Rehearing should therefore be denied by this Court.

Respectfully submitted this 14th day of April, 2011.

STOREVISIONS, INC., Plaintiff/Appellee

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